



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 168 OF 2013**

**ORDER OF ST.AUGUSTINE KENYA**

**REGISTERED TRUSTEES.....PLAINTIFF**

**=VERSUS=**

- 1. ALFRED OTIENO**
- 2. GEORGE OUMA OCHIENG'**
- 3. RECILA NEKESA PAMBA**
- 4. MARGARET ONGOMA ANDENJE**
- 5. BENSON ANYANGO'R JUMA**
- 6. WYCLIFFE OCHIENG'**

**(BEING THE OFFICIALS OF SUPPORT**

**AFRICAN CHILD NETWORK.....DEFENDANTS**

**JUDGEMENT**

1. By a plaint dated 4<sup>th</sup> February 2013. The Plaintiff prays for judgement against the Defendants jointly and severally for:-

- a) A declaration that the Plaintiff is the sole legal and lawful owner and or proprietor of all that piece of parcel of land containing 8 plots of land being subdivisions from title No.L.R 31/17, situate in Ruaraka within Nairobi County.*
- b) A mandatory injunction compelling the Defendants to issue the Plaintiff with the letters of allotment and or duly executed transfer forms of the said plots.*
- c) A permanent injunction against the Defendants by themselves and or through their assigns, agents, successors, and or personal representatives from in any way interfering, entering and or taking possession or constructing in 8 plots of land being sub-divisions from title No.L.R 31/17, situate in Ruaraka within Nairobi County.*
- d) A permanent injunction against the Defendants by themselves and or through their assigns, agents, successors, and or personal representatives from interfering, accessing or dealing in any manner whatsoever with the management of the school and the school accounts of Blessed Teresa of Avila High School, Ruaraka, Nairobi County.*
- e) An order compelling the Defendants to give an account of all the monies they have collected for and on behalf of Blessed Teresa of Avila High School, Ruaraka and refund any monies misappropriated.*
- f) An order directed to the OCS Ruaraka Police station to supervise by himself and or through junior officers, the vacation of the Defendants from the suit premises at the Defendants' own costs.*

***g) Costs of this suit plus interest thereon at court rates.***

2. It is the Plaintiff's case that by a Deed of Transfer dated 12<sup>th</sup> April 2009, the Defendants' assigned eight (8) plots of land being subdivisions from title **No.L.R 31/17**, situate in Ruaraka to the Plaintiff and handed over Blessed Teresa of Calcutta High School located in the suit property.

3. The Plaintiff contended that the Defendants however refused to hand over the allotment letters of the suit plots and the school itself and that they have proceeded to attempt to change the name of the school and register it as Support African Child Network and have opened new bank accounts for the school.

**The Defendant's case**

4. Vide the defence and counterclaim dated 4<sup>th</sup> February 2015, the Defendants denied the allegations contained in the plaint and contended that vide a letter dated 26<sup>th</sup> January 2008, they requested the Plaintiff while undergoing registration of Blessed Teresa Of Calcutta High School with the Ministry of education to assist in registration because they were registered as a community based organization. They added that they made it clear to the Plaintiff that the Plaintiff would not in any way be involved in the direct management of the school, and in its financial undertakings but would have the Plaintiff nominate one person into the school's Board of Governors.

5. They also contended that they were caused to sign the Deed of Assignment dated 12<sup>th</sup> April 2009 by mis-representation and non-disclosure of material facts. In their counterclaim they seek for a declaration that Blessed Teresa of Calcutta High School situated on parcel **No.L.R 31/17**, Ruaraka is absolutely owned by Support African Child Network through the Defendants.

In their counterclaim they seek:-

***1. A declaration that Blessed Teresa of Calcutta High School situated on LR 31/17 Ruaraka Nairobi is absolutely owned by Support African Child Network through the Defendants herein.***

***2. That costs of this suit be provided for.***

**The Plaintiff's evidence.**

6. PW1, Reverend James Wambugu a catholic priest from the Plaintiff testified on 23<sup>rd</sup> June 2021. He adopted his witness statement dated 29<sup>th</sup> May 2019 as part of his evidence. He told the court that the Plaintiff has been running Sacred Heart Catholic Church in Baba Dogo where the Defendants are members. He stated that the Plaintiff's relationship with the Defendant began around 2006 when they joined hands to launch Support African Child Network for the good of the parishioners.

7. He added that the Defendants later invited the Plaintiff for the launch of Blessed Teresa of Calcutta High school and the Defendants requested the Plaintiff through its parish priest to allow the school to be registered as a church sponsored school and the church accepted.

8. He further stated that vide their letter dated 26<sup>th</sup> January 2008, the Defendants requested the Plaintiff to sponsor the school and the church accepted and to date the Plaintiff continues to be the sponsor both materially by providing financial support and human resource support.

9. It was his testimony that as a policy, the Plaintiff only funds its own projects and projects which support the Plaintiff in its pastoral and development activities therefore to that end, the Defendants expressed their desire to hand over the school to the Plaintiff.

10. He stated that the Plaintiff agreed to pay for purchase of 8 plots of land hived from L.R 31/17 Ruaraka where the school is situated and paid an initial purchase price of Kshs.400,000/= leaving a balance of a similar amount which was also paid and the Defendant's officials signed a Deed of Assignment assigning the plots to the Plaintiff and handed over the school to the Plaintiff.

11. He stated that the Defendants would later refuse to hand over the school and attempt to register the school in their name. They also refused to hand over allotment letters to the plots to enable the Plaintiff to obtain title.

12. He stated that in addition, the Defendants embarked in serious mismanagement of the school funds resulting in the school bank account Number 7009380006 Bank of Africa, Ruaraka Branch running into an overdraft of nearly kshs.500,000/= and as a result the teachers in the school did not receive their December 2012 salaries prompting the Plaintiff to step in and pay the salaries on the understanding that upon receipt of the school fees, the Defendants would refund the Plaintiff but instead of refunding, the Defendants opened another account into which school fees are being paid.

13. He further stated that in order that the students do not suffer, the Plaintiff has had to continue paying to support the children. He prayed that the Defendant be compelled to hand over the school and the plots.

14. On the 1<sup>st</sup> February 2021, when the matter came up for hearing, Mr. Kerongo held brief for Mr. K. A. Nyachoti for the Defendants. He told the court that Mr. Nyachoti for the was engaged in another court in Narok. He also told the Defendants principal witness was indisposed. The court upon considering the said application granted an adjournment and scheduled the hearing for 23<sup>rd</sup> June 2021.

15. On the 23<sup>rd</sup> June 2021, there was no appearance for the Defendants or counsel. The court was satisfied that the date had been taken by

consent and directed that the matter proceeds exparte. The Plaintiff's witness testified and closed its case. The Defendants' case was also closed at this point. The Defendants did not tender any written submissions.

**The Plaintiff's submissions.**

16. They are dated 13<sup>th</sup> July 2021. The Plaintiff submitted that the issues for determination by this court are:-

*a) Whether the Plaintiff is the owner of the suit property.*

*b) Whether the Plaintiff is entitled to the reliefs sought.*

17. The Plaintiff relied on the case of **Motex Knitwear Mills Limited vs Gopitex Knitwear Mills Limited [2009] eKLR** to submit that the Plaintiff's case is uncontroverted since the Plaintiff testified and the Defendant did not attend court to testify.

18. It also submitted that having paid kshs.800, 000/= for purchase of the suit plots, it is the owner of the suit property. It added that having regard to the relationship between the parties and their conduct, the school rightly belongs to the Plaintiff.

19. It further submitted that the contract between it and the Defendants was binding and the Plaintiff discharged its obligations thus it is entitled to a permanent injunction. It relied on the case of **Kenya Power & Lighting Company Ltd v Sheriff habib [2018] e KLR** and the case of **John Wakaba Njau & 11 others v Markroscar Kenya Limited [2020]e KLR**.

20. I have considered the pleadings and the evidence on record. I have also considered the written submissions on record and the authorities cited. The issues for determination are:-

*(i) Whether the Plaintiff is the owner of the suit property on which the school stands.*

*(ii) Is the Plaintiff entitled to the reliefs sought?*

*(iii) Who should bear costs of the suit?*

21. It is not in dispute that the Defendants acting through a Nongovernmental organization known as Support African Child Network came up with the idea of starting Blessed Teresa of Calcutta High School (hereinafter referred to as "**The School**"). They approached the Plaintiff to assist with the registration of the school.

22. The Plaintiff agreed and the school was registered as church sponsored. An account was opened by the Plaintiff in its name for this purpose. The Plaintiff was a mandatory signatory to the account. A copy of registration was produced as an exhibit in this case.

23. It is the Plaintiff's case that the land on which the school is constructed belongs to the Plaintiff. A Deed of Assignment dated 12<sup>th</sup> April 2009 was produced as exhibit in this case. Four plots in LR 31/17 Ruaraka were assigned to the Plaintiff upon paying Kshs.400,000/- as initial payment to the Defendants. The Deed of Assignment is duly executed by all parties. This evidence was not controverted by the Defendants.

24. It is also on record that the Defendants handed over the management of the school in 2010 as per the letter produced as exhibit. It is the Plaintiff's case that the Defendants despite handing over the school voluntarily have failed to complete the surrender of management and the assets of the school. Further that since the handover, the school has been wholly managed and sponsored by the Plaintiff. There is evidence that the Plaintiff has been paying the staff salaries as per the payment vouchers produced as exhibit P10.

25. The Defendants in their defence and counterclaim state that the Plaintiff only agreed to assist in the registration of the school and that it be registered as church sponsored. It is their case that the Plaintiff attempted to take over the management of the school through the back door. Further that the land on which the school stands and the bank account are exclusively owned by the Defendants. The Plaintiff denied that they handed over the school to the Plaintiff.

26. I find that by minutes of meetings held on 2<sup>nd</sup> December 2012, 4<sup>th</sup> December 2012 produced as exhibits P9 (a) and (b), the Defendants acknowledged they handed over the school.

27. I find that the Plaintiff has proved that it is the owner of the suit property on which the school stands. Its evidence has not been controverted.

28. The Defendants pleaded that the Deed of Assignment was fraudulent but no evidence was tendered to prove this allegations. Allegations of fraud must be specifically pleaded and must be proved. In the case of **Eunice Grace Njambi Kamau and Another vs The Attorney General and 5 Others Civil Suit No 976 of 2012** the court cited the decision of Tunoi JA (as he then was) in **Vijay Morjoria vs Nansingh Madhu Singh Darbar & Another [2000] eKLR** where it was held that:-

*"It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also well settled law that fraudulent conduct must be distinctly alleged and must be distinctly proved, and it not allowable to leave fraud to be inferred from the facts".*

29. From the foregoing, I find that the Plaintiff is entitled to the reliefs sought in the Plaintiff.

30. Costs follow the event. The Plaintiff is entitled to costs of the suit.

31. Accordingly, judgment is entered for the Plaintiff as against the Defendants jointly and severally as follows:-

*(a) A declaration is hereby issued that the Plaintiff is the sole legal and lawful owner and or proprietor of all that piece of parcel of land containing 8 plots of land being subdivisions from title No.L.R 31/17,situate in Ruaraka within Nairobi County.*

*(b) A mandatory injunction is hereby issued compelling the Defendants to issue the Plaintiff with the letters of allotment and or duly executed transfer forms of the said plots.*

*(c) A permanent injunction is hereby issued against the Defendants by themselves and or through their assigns, agents, successors, and or personal representatives from in any way interfering, entering and or taking possession or constructing in 8 plots of land being sub-divisions from title No.L.R 31/17,situate in Ruaraka within Nairobi County.*

*(d) A permanent injunction is hereby issued against the Defendants by themselves and or through their assigns, agents, successors, and or personal representatives from interfering, accessing or dealing in any manner whatsoever with the management of the school and the school accounts of Blessed Teresa of Calcutta High School, Ruaraka, Nairobi County.*

*(e) An order is hereby issued compelling the Defendants to give an account of all the monies they have collected for and on behalf of Blessed Teresa of Calcutta High School, Ruaraka and refund any monies misappropriated.*

*(f) An order is hereby issued directed to the OCS Ruaraka Police station to supervise by himself and or through junior officers, the vacation of the Defendants from the suit premises at the Defendants' own costs.*

*(g) Costs of this suit plus interest thereon at court rates.*

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF DECEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Beacco for the Plaintiff

No appearance for the Defendants

Steve - Court Assistant